

ALJ/VDR/avs

Decision 01-05-020 May 3, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Amended Application of Marine Services Express, Inc., a California corporation, for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled Vessel Common Carrier Service between Designated Points and Places in the greater San Francisco Bay Area pursuant to and under contract(s) with Governmental or Private Entities on an Emergency, Interim or Continuous Basis.

Application 99-01-003
(Filed January 5, 1999)

INTERIM OPINION

Summary

We grant the joint motion of the applicant and the protestant to apply our settlement rules to this proceeding, but we deny their joint motion for adoption of a written settlement. The applicant and protestant are allowed 60 days from the effective date of our order to renegotiate their settlement and propose it to us for adoption by a new motion. Alternatively, the applicant has 60 days to revise its application. If neither action is taken within that time period, the application will be dismissed.

Background and Procedural History

On January 5, 1999, the applicant¹ filed an application for interim and permanent operating authority to establish and operate scheduled vessel common carrier service, under a contract with sponsoring governmental agencies, between Alameda and Oakland on one hand and San Francisco on the other, and between San Francisco and Angel Island. The reason the applicant filed this application was that at the time it anticipated it would succeed Blue & Gold Fleet, L.P. (Blue & Gold) as the operator of the ferry service.² The application was initially unopposed.³

On July 15, 1999, the ALJ conducted the first prehearing conference (PHC). Because the status of the Oakland/Alameda Ferry contract was unsettled at the time of this PHC, the applicant raised for the first time the possibility of applying for “blanket” operating authority, enabling it to compete for San Francisco Bay Area ferry contracts without first seeking specific Commission operating authority. Typically the timeline for bidding such contracts is relatively short, and often does not permit a prospective operator to obtain operating authority

¹ The application was originally filed under the name of Hornblower Marine Services East Bay Express. An amendment to the application later advised the Commission that the applicant had changed its name to Marine Service Express, Inc., and on May 5, 2000 the assigned administrative law judge (ALJ) issued a ruling acknowledging this change and revising the caption of the proceeding. We refer to the applicant throughout this decision by its new name, or simply as “applicant,” for the sake of simplicity

² We refer to this service throughout as the Oakland/Alameda Ferry, the name used by the sponsoring agencies and Blue & Gold.

³ A letter from the Inlandboatmen’s Union of the Pacific requested an extension of time to protest under Rule 48 of our Rules of Practice and Procedure (Rules), but the ALJ ruled that the request was untimely.

from us before submitting its bid or being required to commence operation of the service.

On October 18, 1999, the applicant filed its First Amendment to Application to formalize its proposal for such authority. This document explained that the Alameda City Council had changed its contracting procedure after the applicant's original application was filed with the Commission. The applicant was the losing bidder for the Oakland/Alameda Ferry. The circumstances for requesting the operating authority in the original application had accordingly ceased to exist. However, the applicant changed its proposal to a request for authority to establish and operate scheduled service between any points on San Francisco Bay whenever and wherever that service would be operated under a public agency or private entity contract. In support of its request applicant cited the existence of growing public interest in new ferry services, the recent creation of an interagency Bay Area Water Transit Initiative Task Force, and legislation⁴ providing preliminarily for the establishment of new ferry services.

Blue & Gold filed a protest to the Amendment, objecting on grounds, among others, that the amended application does not contain the requisite showing of public convenience and necessity, and that it is premature, overbroad, and not in conformity with the requirements of Rule 21 of our Rules of Practice and Procedure (Rules). The ALJ held a second PHC on June 1, 2000, to discuss the revised proposal and the regulatory issues it raised. Although Blue & Gold objected to granting the amended application in favor of Marine

⁴ Senate Bill (SB) 428.

Services in view of the companies' competitive relationship, both parties agreed in concept that it was desirable to make blanket authority available to all San Francisco Bay ferry operators, and that doing so would address Blue & Gold's concerns. In light of their basic agreement in principle, the parties were encouraged to explore the possibility of reaching a negotiated resolution of their differences. They were also encouraged to invite the assigned advisory staff member from the Commission's Rail Carrier and Safety Division to their discussions, with the hope that any agreement would also be workable from the regulatory standpoint.

On August 10 the parties filed a joint motion to apply our settlement rules to this proceeding,⁵ and a joint motion for approval of a written settlement agreement that they had signed. Their settlement agreement contains the following terms:

- (1) Marine Services will be issued a blanket certificate to establish and operate scheduled and on-call vessel common carrier services between designated points and places in San Francisco Bay and its tributary waters under contract(s) with governmental agencies or private entities.
- (2) This blanket certificate would be subject to the following conditions:
 - (a) The contract for the services to be performed must require continuous vessel common carrier service for minimum of five days per week.

⁵ Our settlement rules, Rule 51 *et seq.*, normally apply only in formal proceedings involving gas, electric, telephone, and class A water utilities, but may also be applied in vessel cases on grounds that doing so would be in the public interest, if a motion to that effect is made under Rule 51.10.

- (b) Each contract must be subject to prior registration pursuant to procedures described below.
- (3) The Commission will establish streamlined registration for the services under the blanket certificate, which will include the flexibility to preserve the contract terms relative to pricing and termination of service.
- (4) Upon application, any other vessel common carrier meeting the threshold financial and operational fitness requirements may also be issued a similar blanket certificate.
- (5) This proceeding may be resolved in accordance with this Settlement with all appropriate orders and authorizations to effectuate it including the issuance of the blanket certificate to Marine Services.
- (6) The Commission will take all such actions as may be necessary to implement the Settlement.

Discussion

Rule 51.1 enables parties in a Commission proceeding to propose by written motion a settlement for adoption by the Commission. If the Commission grants the motion, the settlement has the force and effect of a Commission order. If, on the other hand, the Commission determines that the settlement is not in the public interest, it may reject it and hold hearings on the underlying issues, allow the parties to renegotiate the settlement, or propose alternative terms to the parties that are acceptable to the Commission, allowing the parties reasonable time within which to accept new terms or request other relief.

The concept of fashioning more flexible operating authority than we have traditionally granted to applicants in vessel common carrier proceedings is appealing, as the assigned commissioner and ALJ have acknowledged. The old regulatory model, under which private carriers sought authority to commence service that was expected to be paid for entirely by passengers' fares, does not fit

the circumstances of most current ferry operations on San Francisco Bay. The contemporary milieu appears to favor the establishment of vessel service under sponsorship of local governmental agencies, real estate developers, and even major employers, who subsidize operations through the device of long-term operating contracts. The contracting process requires a prospective operator to possess appropriate operating authority from the Commission before bidding on the contract or commencing operation, necessitating a quick regulatory response from this Commission. However, our procedure for granting operating authority was developed long ago in a greatly different competitive environment, and is not well suited to the circumstances of ferry services that have commenced operations on the Bay in the past decade.⁶ We are therefore sympathetic to the parties' efforts to negotiate an agreement that would enable Marine Services to respond quickly to bidding requirements or operating contract timelines.

We nevertheless find ourselves confronted with a dilemma, because the proposed agreement here does not fit the context of the proceeding, and creates more regulatory problems than it would solve. The context of this proceeding is that of Marine Services' own effort to obtain open-ended authority to operate ferry services on San Francisco Bay under contractual arrangements with third-party sponsors, and not that of a rulemaking to effect sweeping changes in our

⁶ The year 1989 was pivotal, as the first of these services began operation that year when the Loma Prieta earthquake required closure of the San Francisco-Oakland Bay Bridge for 30 days. We granted initial operating authority by emergency order, but as certain of these services became established permanently under the aegis of sponsoring agencies, our procedure for certificating new services have proven to be cumbersome and unresponsive.

certification procedure. However, the terms of the settlement would grant far broader relief than we are able to grant in an application proceeding. Moreover, it does not place any limitations on the blanket certificate that Marine Services seeks. The authority requested by Marine Services would be valid indefinitely, and the number of services it could operate would be unrestricted. There is no provision for reexamination of Marine Services' fitness prior to adding new services, or for evaluation of potential cumulative environmental effects of establishing such new services. The settlement also purports to bind the Commission to grant operating authority in the future, and in effect would create a new general rule for granting authority to other prospective applicants. In short, the settlement goes beyond the scope of what the parties may accomplish by mutual agreement in this proceeding.

To a certain extent this problem is the result of the fact that the amended application is overbroad. We are amenable to a request to find with limited prospective effect that Marine Services is financially and operationally fit to operate an existing vessel service like the Oakland/Alameda Ferry, and perhaps certain new services. We are also willing to accept the existence of a contract as a demonstration of public need, as the sponsoring agency or entity has already made a determination that the need exists, and in effect is willing to underwrite what amounts to a charter operation at its own expense to fulfill that need. Finally, changing the contractor for an existing vessel service has no foreseeable significant environmental effect, because the scope of the operation does not change. We can work within these parameters in fashioning an appropriate order.

By contrast, the prospect of granting unlimited authority to Marine Services would leave many questions unanswered. How many new services will

the applicant undertake to operate altogether? How many vessels will be operated? Will Marine Services be financially and operationally able to undertake the operation of a potentially unlimited number of new vessel services? What will be the environmental impact of new services, individually and collectively? In the absence of detailed and reliable answers to these questions the Commission would be abdicating its regulatory responsibilities by granting unlimited authority without the necessary findings. No matter how well intended Marine Services' request may be, we cannot go this far.

Other aspects of the settlement proposal are also problematic. Several provisions purport to bind the Commission to adopt new general procedures, approve similar requests for operating authority from other vessel common carriers, and take all necessary action to carry out the parties' agreement. As a general matter, it is entirely inappropriate for the parties to attempt to bind the Commission in this fashion. Moreover, Rule 51.1(a) expressly limits a settlement to the issues in the immediate proceeding and prohibits the settlement from extending to substantive issues which may come before the Commission in "other or future proceedings," precluding the adoption of such a procedure.

Finally, the parties' agreement that the Commission will establish streamlined registration procedures is also invalid because we can only adopt such rules of general application using notice and comment rulemaking procedures. Although we can include reasonable terms and conditions in an order if they pertain specifically to the circumstances of the particular proceeding, we cannot make sweeping changes to our general procedures for granting vessel common carrier operating authority by implementing a private agreement between the parties in an application proceeding.

In summary, we are amenable to considering a settlement in which the parties (1) provide for the establishment of a reasonable and specifically defined number of new (to the applicant) services pursuant to public agency and private entity contracts, if those services will commence within a reasonable, specifically defined time period; (2) agree that the protestant waives any claim that the applicant is operationally and financially unfit to do so; (3) agree that the existence of a contract indicates that there is a public need; (4) agree that a protestant withdraws the protest in the proceeding; and (5) forecloses the applicant from filing a protest if the protestant should apply for operating authority for the same service within a defined time period. The terms and conditions we foresee adding to the order upon adoption of such a settlement include provision for an appropriate level of environmental review, particularly with respect to prospective service that is entirely new, and especially if new construction will be required.

Although we realize that our decision today may be discouraging to the parties, we encourage them to renew their settlement efforts if they can do so without exceeding these limitations. We want to provide the best possible environment for settlement negotiations, and our order therefore adopts an approach suggested by the second and third options in Rule 51.5: although we reject the settlement before us, we will give the parties 60 days to renegotiate their agreement so as to be consistent with the guidelines set forth above, and to resubmit it to us by new motion if they so choose. Alternatively, Marine Services may request other relief by again amending its application. If neither of these actions is taken by the expiration of the 60 days, we will dismiss the amended application.

Comments on the Draft Decision

The draft decision of ALJ Victor Ryerson in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g)(1) and Rule 77.7 of the Rules and Practice and Procedure. No comments were filed, and accordingly no revisions have been made to the draft.

Findings of Fact

1. By joint motion the parties have asked the Commission to adopt a written settlement agreement to resolve issues raised by the amended application, and by Blue & Gold's protest thereto.

2. The written settlement agreement would conclude this application proceeding by granting applicant Marine Services a certificate of public convenience and necessity (CPCN) to operate scheduled and on-call vessel common carrier services between points yet to be designated on San Francisco Bay and its tributary waters under contract(s) with governmental agencies or private entities.

3. The settlement agreement contains no limitation on the number of vessels or services that Marine Services could commence to operate under the authority of the CPCN.

4. The settlement agreement contains no limitation on the length of time within which Marine Services could commence the operation of vessel common carrier services under the authority of the CPCN.

5. The settlement agreement would automatically entitle the protestant and any other qualified vessel common carrier to institute service on the same terms and conditions as Marine Services, i.e., without limitations on the time or number of operations on the time in which they may be commenced.

6. The settlement agreement purports to bind the Commission to adopt new certificating procedures of a general nature, and to grant other relief beyond the scope of the application.

7. The settlement agreement extends to substantive issues which may come before the Commission in other or future proceedings.

8. The settlement agreement purports to bind the Commission to grant authority to operate entirely new vessel services without conducting any review of the potential environmental effects of those services.

Conclusions of Law

1. The settlement agreement is overbroad.

2. Carrying out the terms of the settlement agreement would negate certain of the Commission's constitutional and statutory regulatory responsibilities.

3. Carrying out the terms of the settlement agreement could amount to rulemaking without due process.

4. Carrying out the terms of the settlement agreement would violate our Rule 51.1(a).

5. Carrying out the terms of the settlement agreement could violate the California Environmental Quality Act.

6. The settlement agreement should not be approved in its present form.

INTERIM ORDER

IT IS ORDERED that:

1. The joint motion of Marine Services Express, Inc. (applicant), and Blue & Gold Fleet, L.P. (protestant) to apply our settlement rules (Rules of Practice and Procedure 51 et seq.) to this proceeding is granted.

2. The joint motion of applicant and protestant to adopt their written settlement agreement dated August 10, 2000, is denied.

3. Applicant and protestant shall have 60 days from the effective date of this order to renegotiate their settlement agreement so as to be consistent with the guidelines set forth in our opinion, and to resubmit their revised settlement to us for approval. Alternatively, the applicant may revise its application by such date.

4. If no action is taken in accordance with the preceding paragraph, the application shall be dismissed.

This order is effective immediately.

Dated May 3, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a concurrence.

/s/ LORETTA M. LYNCH
President

A.99-01-003

D.01-05-020

CONCURRING OPINION of Commissioner Lynch:

I concur in the result of this decision but write separately to comment on two aspects of this decision. The decision notes that it is difficult for the Commission to approve a settlement in which parties agree among themselves what the nature of the Commission's regulatory program should be. The decision also points out that the question of the expansion of ferry service on the San Francisco Bay raises environmental issues. Therefore, I agree with the decision's conclusion that the settlement brought before the Commission should not be adopted. I would also like to caution parties to take seriously the mandate the decision provides. If this Commission is to approve another settlement in this proceeding, it must find that the settlement is lawful and protects the public interest. I will closely scrutinize any new settlement to ensure that it meets those standards.

/s/ LORETTA M. LYNCH

LORETTA M. LYNCH
President

San Francisco, California
May 11, 2001